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March 24, 1982

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ARIZONA ATTORNEY GENERAL

Mr. Mark Sanders, Publisher  
Arizona Highways Magazine  
2039 West Lewis Avenue  
Phoenix, Arizona 85009

Re: I82- 043 (R81-136)

Dear Mr. Sanders:

By letter dated September 24, 1981, you asked for our opinion regarding the taxability of Arizona Highways Magazine after the enactment of Ch. 321, 1981 Ariz. Sess. Laws (1st Reg. Sess.). Your specific questions inquire into the taxability of Arizona Highways Magazine's activities of publishing the magazine and selling items such as books, binders, calendars and collector plates. It is our opinion that, as a result of this new legislation, certain activities of Arizona Highways Magazine are taxable, as set forth in the following discussion.

The Legislature, in Chapter 321, amended A.R.S. § 42-1301 by including in the definition of "person" for transaction privilege tax purposes "this state, a county, city, town, district or other political subdivision." (emphasis added). "Business" is defined by A.R.S. § 42-1301.2 as including

all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage, either directly or indirectly, but not casual activities or sales.

Consequently, as a result of Chapter 321, if the state, or any of its agencies or subdivisions is engaged in an activity that has as its objective any gain, benefit or advantage, then it will be subject to the transaction privilege tax to the same extent as a private enterprise would be. We therefore need to determine whether the state's activities related to the publishing of Arizona Highways Magazine are activities which constitute business for purposes of taxation.

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The definition of business is generally construed as any activity that is intended to benefit an organization, its organizers or members.<sup>1/</sup> The Arizona Court of Appeals in Miami Copper Co. v. State Tax Commission, 121 Ariz. 150, 589 P.2d 24 (1978), cert. denied 441 U.S. 932 (1979), stated, 121 Ariz. at 153:

In construing the intent of the privilege tax, 'business' is to be given its ordinary definition. Arizona State Tax Commission v. First National [sic] Bank Building Corp., 5 Ariz. App. 594, 429 P.2d 481 (1967). If an activity is intended to benefit an organization, it is properly considered the 'business' of the organization. See § 42-1301, supra; O'Neil v. United Producers and Consumers Cooperative, 57 Ariz. 295, 113 P.2d 645 (1941)

In O'Neil v. United Producers and Consumers Cooperative, 57 Ariz. 295, 113 P.2d 645 (1941), the court stated that "any activity carried on by the corporation which benefits its organizers or members constitutes business within the meaning of this provision." (Citing 73-1302 ACA 1939, predecessor to A.R.S. § 42-1301) Inasmuch as it appears that the activities of Arizona Highways are designed to benefit the State of Arizona by promoting tourism to the state, and by recouping most of the expenses of such promotion through the sale of the magazine, books and other various items, the state's activities may be considered to be business activities.

The activities engaged in by Arizona Highways Magazine are specifically authorized by A.R.S. § 28-1881 for the stated purpose of encouraging tourist travel to and through the state. Arizona Highways Magazine originally was authorized by an emergency measure in Ch. 29 (1941 Ariz. Sess. Laws). Section 1 of the law stated:

"Section 1. HIGHWAY COMMISSION AUTHORIZED TO  
EXPEND MONEY FOR PURPOSE OF ATTRACTING

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1. The fact that Arizona Highways may not operate at a profit does not mean that it is not engaged in business for transaction privilege tax purposes. Profit is not a necessary element. Town of Somerton v. Moore, 58 Ariz. 279, 119 P.2d 251 (1941).

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TOURISTS. For the purpose of augmenting tourist travel to and through this state, the highway commission is hereby authorized to expend moneys from the highway funds for advertising places and matters of scenic or historic interest, climate, possibilities of successful pursuits or industrial enterprises and any other matters or objects, which, in the discretion of said commission, tends to attract travelers or prospective travelers to or through this state. This authorization shall extend only to the subject matter incorporated in the publication known as the Arizona Highways Magazine and to the publication of maps, mats, pamphlets and other informative material designed to carry out the provisions of this act."

This declared legislative objective of benefiting the State of Arizona and its citizens through the attraction of tourists, travelers and those who might invest in the state's economy through industrial enterprises and other pursuits has been carried forward from that time to the present. A.R.S. § 28-1881 now provides, in pertinent part:

A. The director may expend from the state highway fund amounts prescribed by law for the purpose of encouraging tourist travel to and through the state by giving publicity to points and places of historic interest, climatic and recreational advantages, the possibilities of successful pursuits and industrial enterprises and such other information as in the opinion of the director tends to attract visitors to the state.

B. The publicity shall be given through the medium of the magazine, 'Arizona Highways' and the publication of maps, pamphlets and other descriptive material designed to carry out the purposes of this article.

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D. The director may distribute the magazine free of charge to libraries, schools, chambers of commerce and to such hotels, tourist agencies, visitors and prospective visitors and to such other persons or agencies, and business, industry or convention organizations in quantities the director deems beneficial in carrying out the purposes of this article.

E. The number of free copies of the magazine each month may not exceed ten percent of the total number of paid subscriptions.

The publication and distribution of magazines and the sale of other items are activities which are commercial in nature, and are usually carried on by private companies. Consequently, such activities engaged in by Arizona Highways Magazine are now subject to the transaction privilege tax.<sup>2/</sup>

It is also relevant to note that the Legislature considers Arizona Highways Magazine to be in competition with private enterprise. In subsection B of Section 11, Chapter

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2. In Town of Somerton v. Moore, 58 Ariz. 279, 119 P.2d 251 (1941), the court stated, in distinguishing City of Phoenix v. Moore, 57 Ariz. 350, 113 P.2d 935 (1941), that swimming pools and golf courses operated by the City of Phoenix were not taxable because they were integral parts of the city's parks, playground and recreation areas, and were installed and operated without any object of gain or profit. In the Moore case, the only evidence on the question of whether the parks, playgrounds, swimming pools and golf courses were operated as a "business" was a report filed by the city superintendent of parks. The report stated that the parks department was not conducted for direct profit, but was operated to provide recreation in an effort to reduce juvenile delinquency and thus to reduce expenses for the salaries of probation and police officers and jail maintenance. The court held that this circumstance took the parks department activity out of the reach of the tax. Significantly, however, other parts of the audit assessment in the Moore case, relating to income received by the city for bus fares and advertising space (e.g., bus stop benches), were found to be "business" activities and the city admitted tax liability for both activities.

321, the Legislature specifically exempted Arizona Highways Magazine from the restrictions set forth in subsection A of Section 22 on activities that compete with private enterprise. This indicates a belief on the part of the Legislature that the activities of Arizona Highways Magazine compete with private enterprise.<sup>3/</sup>

An examination of the legislative intent behind the enactment of Chapter 321 indicates that the Legislature intended to subject the state and its agencies to the transaction privilege and related taxes. Several facts support this conclusion.

First, it has been judicially recognized that, in determining the extent and operation of a law, as well as ascertaining legislative intent, a court must not only consider the law itself, but its title as well. State v. Superior Court in and for Pima County, 128 Ariz. 535, 627 P.2d 686 (1981); In re Twenty-One Slot Machines v. Eyman, 72 Ariz. 408, 236 P.2d 733 (1951).

Chapter 321 declares inter alia, that it is:

An Act relating to state government ...  
prescribing application of transaction  
privilege and affiliated excise taxes to  
this state and certain local  
governments. . . . (emphasis added).

This statement reflects the Legislature's desire to subject the state and various local governmental units to the direct

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3. In this regard, it should also be noted that Article 2, § 34 of the Arizona Constitution gives the State and municipalities the right to engage in industrial pursuits. In dealing with the question of what type of business activities municipalities may engage in, it has generally been held that after the passage of Article 2, § 34, municipalities could engage in any business pursuit so long as such activity was for a public purpose, and not for purely private gain. City of Tombstone v. Macia, 30 Ariz. 218, 245 P. 677 (1926); Shaffer v. Alt, 25 Ariz. App. 565, 545 P.2d 76 (1976). Since Article 2, § 34 is not self-executing, Bone v. Bowen, 20 Ariz. 592, 185 P. 133 (1919), the specific activity must still be authorized by statute. Tillotson v. Frohmiller, 34 Ariz. 394, 271 P. 867 (1928).

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application of the taxes in question as a result of their business activities.

Second, although the Legislature could have fashioned a very limited statute to subject only certain specified activities of the state to taxation, it decided to amend the definition of "person" in A.R.S. § 42-1301.15, a definition that is applicable throughout all sections of the transaction privilege and affiliated taxes tax codes. The result is that when the state is engaged in activities which, if performed by a private individual, corporation or other similar entity would be taxable, the state is now subjected to the tax in the same manner as would be such an individual, corporation or entity: all are "persons" within the purview of A.R.S. § 42-1301.15.

Third, the title of Chapter 321 also states that it is an act "providing for limitation on state agency competition with private enterprise" and "prescribing exceptions and standards by which state agencies may compete with private enterprise." Section 11.A of the Act (uncodified: see Ch. 321, 1981 Ariz. Sess. Laws, Arizona Legislative Service (1981), Vol. 5, p.1240) generally prohibits state agency competition with private enterprise. This language establishes the legislative intent that state agencies are to be severely limited in their activities insofar as they compete with private enterprise. To the extent that agencies are allowed to compete, they shall do so upon an equal economic footing, viz., they, like their private enterprise counterparts, shall be subject to the transaction privilege and affiliated taxes.

Fourth, Section 13 of Chapter 321 creates the State Private Enterprise Review Commission to monitor the Act in its application to state agencies and report its findings and proposed legislative changes to the Legislature. The Commission was originally established by the Legislature by Ch. 23 1980 Ariz. Sess. Laws (2nd Reg. Sess.) for the purposes of reviewing the problems associated with governmental agencies that competed with nongovernmental private entities and recommending to the Legislature ways to prohibit the practice. After its initial report, it was to have been dissolved, but Chapter 321 reestablished it and required reports from it not later than December 31, 1981 (the December 31, 1981 report has not yet been completed) and a second report, with findings and proposed legislation, not later than July 1, 1982.

The December, 1980 Commission report noted that one of the major complaints of private enterprise -- particularly businesses with which the state university bookstores competed

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-- was the unfair competitive advantage enjoyed by various state entities occasioned by their then-existing exemption from the transaction privilege tax. Pursuant thereto, section 8 of Chapter 321 amended A.R.S. § 42-1312.A to specifically exempt from the transaction privilege tax [t]he sale of textbooks that are required by any state university or community college by any bookstore. (Emphasis added). Under this amendment, any bookstore, whether operated by a state university or a private businessman, is exempted from the tax on the designated sales. Notwithstanding the fact these complaints were adequately answered by the amendment of A.R.S. § 42-1312.A, the Legislature went further by also amending the general definition of "person" in A.R.S. § 42-1301.15. The only logical conclusion to be drawn from this fact is that the Legislature specifically intended to extend the "economic equalizing" effect of the transaction privilege tax to all entities fitting the amended definition of "person" (i.e., including the state) and not just state university bookstores.

On October 24, 1980, the Commission met to review testimony theretofore received and to make its recommendations to the Legislature. The sixth and final specific recommendation made by the Commission was to "[m]ake government agencies, except public school districts, legally responsible for paying 'sales tax' on their sales of goods." When all of the foregoing factors are considered, we think the Legislature clearly intended to subject the state and its agencies, departments, offices, commissions, institutions and boards, whether or not state monies are appropriated to them (see Section 10, Chapter 321, 1981 Ariz. Sess. Laws (1st Reg. Sess.)) to the transaction privilege and affiliated taxes. Unless the Legislature amends any of the pertinent provisions, Chapter 321 must be acknowledged and enforced according to its terms.

Returning to your questions, it appears that Arizona Highways is primarily engaged in two business activities: 1) the publishing of Arizona Highways Magazine; and 2) the selling of certain items such as books, binders, calendars and collector plates at retail. The transaction privilege tax is levied upon persons engaged in the business of publishing by A.R.S. § 42-1310.2.g, which provides:

The tax imposed by subsection A of § 42-1309 shall be levied and collected at the following rates:

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2. At an amount equal to one per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the following businesses:

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(g) Publication of newspapers, magazines or other periodicals and publications, except the manufacturing or the publishing of books, when published within the state, including the gross income derived from subscriptions, local advertising and notices. Subscription income from the publishing of newspapers subject to taxation under this section includes all circulation revenue but does not include amounts actually retained by or credited to carriers and other vendors as compensation for sale or delivery of newspapers.

In carrying on its publishing activity, Arizona Highways contracts for the printing of the magazine and also the distribution of the magazine to newsstands and other retail outlets. A majority of the magazines are sold to subscribers. Because the transaction privilege tax is measured by gross receipts or gross income, all of the subscription revenues received by Arizona Highways are includable in the measure of the tax, unless specifically exempt pursuant to a particular statutory provision, e.g., sales to charitable hospitals. See A.R.S. § 42-1321.A.5 and A.C.R.R. R15-5-1306. Subscription revenues from subscribers outside of Arizona are also includable in Arizona Highways' taxable base, because such subscriptions are not specifically exempt. A.C.R.R. R15-5-1305.

The remainder of Arizona Highways' publishing revenues comes from distributions to newsstands and other retail outlets. The actual distribution to such retail outlets is handled on a contract basis by an independent distributor. This independent distributor then dispenses the magazines to retail outlets around the country through various local distributors. Except for possible occasional contacts, Arizona Highways does not deal directly with either the retail outlets or with the various local distributors.



The extent to which the income generated by such retail distributions is includable in Arizona Highways' taxable base depends primarily on the nature of the agreement between Arizona Highways and the independent distributor. If the magazines are actually sold to the distributor, then only the amount received from the distributor would be included in Arizona Highways' taxable base. If, on the other hand, the distributor simply acts as an agent on behalf of Arizona Highways in dealing with the local distributors and the retail outlets, then the taxable base would also include any amounts retained by the independent distributor as payment for its services. Since we do not know the terms of any agreement that Arizona Highways may have with the distributor, we cannot state whether the transaction between Arizona Highways is a sale of the magazine, or simply an agency agreement.<sup>4/</sup>

Other Arizona Highways' activities, such as selling books, binders, calendars and collector plates, are taxable pursuant to A.R.S. § 42-1312. Under A.R.S. § 42-1310.2.g, the direct manufacture and sale of books is taxable under the retail classification. A.C.R.R. R15-5-1301.C. Under the retail classification, any sales for resale, sales to non-residents with delivery out-of-state, (A.R.S. § 42-1312.A.11) and sales to charitable hospitals (A.R.S. § 42-1321.A.5) are not subject to the tax. Other retail sales

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4. Additionally, with respect to the publishing activity, Arizona Highways should be aware of the following:

- 1) Under A.R.S. § 42-1310.2.h, the sale of job printing to a person who has a transaction privilege tax license issued in this state to resell such property is exempt from the tax. Consequently, when Arizona Highways obtains a license, the printer with whom Arizona Highways contracts for the printing of the magazine will no longer be subject to the tax on such printing services. Consequently, the printer would then have no occasion to pass the cost of such tax on to Arizona Highways.
- 2) Gross income does not include the sale price of property returned if the full sales price is refunded.

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are generally subject to the tax, and consequently the gross receipts from such sales must be included in Arizona Highways' taxable base.

Your opinion request also sought clarification regarding collection and payment of the tax. The tax involved is not a true "sales" tax, but a transaction privilege tax levied upon businesses for the privilege of engaging in business. There is no statutory requirement that the tax be charged to or collected from the purchaser. Arizona State Tax Commission v. Garrett Corporation, 79 Ariz. 389, 291 P.2d 208 (1956); State Tax Commission v. Quebedeaux Chevrolet, 71 Ariz. 280, 226 P.2d 549 (1951).

The tax is levied by A.R.S. § 42-1309, and is measured by gross income or gross receipts derived from the particular taxable activity involved. Under A.R.S. § 42-1302, however, gross income does not include an added charge made to cover the tax if it is established to the satisfaction of the Department that such charge was added to the sales price and was not absorbed by the taxpayer. Consequently, if Arizona Highways separately passes on the cost of its transaction privilege tax liability to its customers, then the amount passed on would not be included in Arizona Highways' taxable base. A.R.S. § 42-1302 also provides that "in no event shall the person upon whom the tax is imposed, when an added charge is made to cover the tax levied by this article, remit less than the amount so collected to the department."

Finally, we note that the agency charged with the administration of the transaction privilege tax act is the Arizona Department of Revenue. Consequently, you should contact the Department in order to obtain the required license. Specific questions regarding the application of the tax with respect to individual transactions should also be directed to the Department.

Sincerely



BOB CORBIN  
Attorney General

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